SUPREME COURT

FILE

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MICHAEL ROBAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No 74-896

BURLINGTON NORTHERN, INC.,

Petitioner,

vs.

THE AMERICAN RAILWAY SUPERVISORS ASSOCIATION; NATIONAL MEDIATION BOARD, AN AGENCY OF THE UNITED STATES OF AMERICA; AND GEORGE S. IVES, DAVID H. STOWE, AND PETER C. BENEDICT, MEMBERS OF THE NATIONAL MEDIATION BOARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT AMERICAN RAILWAY SUPERVISORS ASSOCIATION IN OPPOSITION.

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March 15, 1975.

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QUESTION PRESENTED.

The "Questions Presented" by petitioner (Pet. 2) are not the real issues in this case. As will appear from this Brief the issue is:

Whether the Court of Appeals correctly ruled that no representation issue under the Railway Labor Act was presented by petitioner and that a Merger Protection Agreement, entered

into by the parties as a condition imposed for employee protection by the Interstate Commerce Commission, pursuant to Interstate Commerce Act §§ 5(2)(f) and 5(11), was consistent with the Railway Labor Act and was a valid and binding agreement, requiring the petitioner to submit an issue of interpretation of the agreement to the arbitration panel provided for in the agreement.

STATUTES INVOLVED.

The statutory provisions principally involved are § 5(2)(f) and § 5(11) of the Interstate Commerce Act, 49 U. S. C. §§ 5(2)(f) and 5(11), and §§ 2, Fourth and Ninth of the Railway Labor Act, 45 U. S. C. § 152, Fourth and Ninth, set forth in Appendix A to the Petition, 9a 10a, 1a, 2a.

STATEMENT.

Pursuant to Supreme Court Rules 40(1)(e) and 40(2), respondent ("ARSA") will rely on the facts concisely and accurately summarized in the opinion of the Court of Appeals and will limit this statement to some of petitioner's misstatements of fact and to misleading matters in its mixed recitation of fact and argument under the heading "Statement of Facts."

The key finding of fact and law by the Court of Appeals—that there is not present here any representation dispute within § 2, Ninth of the Railway Labor Act ("RLA"), 503 F. 2d at 60-1, 63, since no employee, or group of employees or union has challenged the representation by respondent—is not challenged by petitioner. As set forth in the Argument, *infra*, this unchallenged finding undercuts virtually all of petitioner's arguments as to the merits and also makes plain there is no issue warranting review by this Court.

It is also undisputed that beginning several months after the merger petitioner not only refused to recognize ARSA and repudiated the Merger Protection Agreement ("MPA"), but also unilaterally abrogated pre- and post-merger collective agreements with ARSA concerning rates of pay, rules and working conditions and unilaterally altered the same to the disadvantage of employees covered by those agreements (J. A. 32, 61; R., Portsche Dep. pp. 60-1, 73-80, 86-7 and Ex. 8). Petitioner took this action after making new collective agreements with ARSA subsequent to the merger, including a union security agreement providing for a check-off of dues with ARSA covering mechanical supervisors on the former CB&Q segment (Under § 2, Eleventh of the RLA [45 U. S. C. § 152, Eleventh] such an agreement can be made by a railroad only with a labor organization that is duly authorized to represent the employees involved).

For a period of six months after the merger it also settled grievances of employees with ARSA. (R., Portsche Dep. pp. 63-67, Exs. 3-7; Aff. of Tracy, Exec. Sec. N. M. B., Ex. J).[1]

We turn next to other inaccurate or misleading statements by petitioner.

1. Petitioner makes the incredible assertion that the MPA "was silent as to bargaining units and as to the representation of employees after the merger." (Pet. 5.) Based on this assertion, petitioner argues that the Court below erred in concluding that the merger agreement recognized the labor organizations signatory thereto, including ARSA (Pet. 12, 23, n. 32). Thus, we are compelled to set forth here the relevant portions of the MPA (the entire agreement is at J. A. 43-56). The preamble recites:

> "* * * the international and national labor organizations signatory hereto are the authorized and recognized representative of certain groups of non-operating employees of said carriers * * *" (J. A. 45).

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1. In an apparent effort to minimize the effect of its handling grievances after the merger, petitioner states (Pet. 8, n. 13) "Burlington Northern has continued to handle grievances with anyone (including ARSA) desired by the employee whose grievance is involved, in accordance with the Railway Labor Act rule that grievance representation is an individual matter, not a unit matter." This statement is false. Subsequent to the merger, 40 claims were filed with the National Railroad Adjustment Board ("NRAB") by ARSA against petitioner concerning the latter's deviations from the collective agreements. Petitioner's response was that the NRAB had no jurisdiction to entertain these claims since ARSA was no longer the representative of the grievants and that the collective agreements relating to rates of pay, rules, and working conditions were no longer in force or effect. After the NRAB sustained all claims, petitioner filed another action in the same District Court to set aside the awards (N. D. Ill., No. 72-1775). In support of its position petitioner made the same arguments it has in this case. After the decision of the Court of Appeals in this case the District Court in No. 72-1775 entered summary judgment on January 31, 1975, dismissing the complaint and granting ARSA's counterclaim for enforcement of the NRAB's orders and awards.

Section 5 provides:

> "The right of the New Company [Petitioner] to transfer work throughout the merged system is recognized. In consideration of the foregoing employee benefits, the labor organizations signatory hereto, upon notice subject to the provisions of Section 4 of the Washington Job Protection Agreement and subject also to the provisions of Section 9 of this Agreement and those of the Memorandum of Understanding attached hereto as Appendix E, will negotiate and enter into implementing agreements providing for the transfer and use of employees and allocations and rearrangements of forces made necessary by such changes to the extent not otherwise permissible under existing rules and agreements. The labor organizations and carriers signatory hereto will cooperate to this end. The implementing agreements to be negotiated with respect to the transfer and use of employees and allocation or rearrangement of forces shall enable the New Company to take such action without liability to furloughed employees who may be affected thereby." (J. A. 50-51; Pet. 93a).

Section 8 provides that petitioner:

> "* * * will take over and assume all contracts, schedules and agreements between the said carriers and the labor organizations signatory hereto concerning rates of pay, rules governing working conditions, fringe benefits and rights and privileges pertaining thereto in effect at the time of consummation of the merger and will be bound by the terms and provisions thereof, subject to changes in accordance with the provisions of the Railway Labor Act, as amended, in the same manner and to the same extent as if the New Company had been a party thereto." (J. A. 51-52; Pet. 93a).

Section 9 provides for final and binding arbitration of any dispute between petitioner and ARSA "with respect to the interpretation or application of any provisions of this agreement . . ." (J. A. 52). It provides further that if the parties are unable to select a neutral chairman, the parties may request the National Mediation Board ("NMB") to appoint the neutral.

Other provisions to insure against a deadlock are provided. (The full text of §§ 8 and 9 are set forth also at Pet. 93a-94a).

Section 11 provides:

> "The foregoing represents an agreed settlement of protection of the interests of the employees of the said carriers in the said transactions. Said agreed settlement of protective benefits is made on behalf of said employees by their authorized and recognized bargaining representatives signatory hereto pursuant to Section 5(2)(f) of the Interstate Commerce Act and applicable provisions of the Railway Labor Act, as amended, and shall become applicable only in the event of approval by the Commission of the proposed transactions and consummation thereof. It shall be considered and construed as a separate agreement between the said carriers, the New Company, and each of the labor organizations signatory hereto." (J. A. 53-54).

Section 12 provides:

> "It is understood and agreed that the provisions of this Agreement shall be for the benefit only of the employees now or hereafter represented by the labor organization parties hereto." (J. A. 54).

Additional duties and responsibilities to be carried out by the labor organizations signatory to the agreement post merger are set forth in Appendices A, D, E, and Letter of Intent No. 3 (R., Ex. 1 to Answer and Counterclaim of ARSA, pp. 14-29). The Letter of Intent makes reference to § 8 of the agreement and recognizes the authority of the labor organizations signatory to the agreement to negotiate with petitioner after the merger. The foregoing provisions of the MPA were succinctly summarized by the Court of Appeals at 503 F. 2d 63; Pet. 18a-19a.

2. Petitioner seeks to give the impression that the sole purpose of the MPA was to provide "attrition protection." (Pet. 4). In order to avoid the implications of the plenary authority vested in the Interstate Commerce Commission ("ICC") by § 5(11) of the Interstate Commerce Act, petitioner argued to

the Court of Appeals that "it is not true that entry into the merger protection agreement was a condition precedent to the merger." (Reply Brief for Burlington Northern, p. 5). It now makes a narrower claim that "the factual premise that the ICC required recognition of ARSA as a condition of approval of the merger is unsupportable" (Pet. 24) apparently conceding, as it must in the face of the history of the ICC proceedings, that approval of the MPA was a condition of approval of the merger.

This narrower claim rests on the device of relegating to the Appendix the order of the ICC requiring petitioner to provide employees "with the basic protection as particularly described in the contract entered into between the applicants and the Brotherhood of Locomotive Engineers and Brotherhood of Railway Trainmen" (Pet. 49a). The agreement with the Brotherhood of Railway Trainmen ("B. R. T.") contains provisions substantially identical with the MPA here, including one that petitioner "will take over and assume all contracts" between its constituent railroads and the union. Relevant parts of the B. R. T. agreement are set forth in the Appendix to this brief.

Both agreements recognized the labor organizations signatory to them as the collective bargaining representatives of the employees on the constituent railroads, not only for the purpose of making the agreement, but for the purpose of enforcing the rights of the employees after the merger and otherwise implementing the agreement. Job protection whether it be "attrition protection" or any other protection would be meaningless without such representation. Recognition of the signatory labor organizations for the foregoing purposes, made explicit in the B. R. T. agreement, was one of the conditions ordered by the ICC when it required petitioner to provide the basic protection provided in the B. R. T. agreement.

3. Petitioner devotes three pages (Pet. 6-9) to the fact that prior to the merger some technicians on the Great Northern sought to invoke the jurisdiction of the NMB under § 2,

Ninth, of the RLA, and that petition was dismissed as moot on June 3, 1970. It places great emphasis on this dismissal as a basis for its repudiation of the MPA and its unilateral determination to alter the collective agreements concerning the rates of pay, rules and working conditions of the employees represented by ARSA. Accordingly, it is of special interest to note the shift in its position concerning this dismissal. In its first brief in the Court of Appeals it asserted (p. 7) that it "understood the NMB action to mean that the merger had terminated the separate existence of the Great Northern technicians' bargaining unit."

When ARSA responded by referring to the letter-clarification by the NMB issued on July 14, 1970, that the notice did not "nullify or disturb any representation rights arising out of the certification issued in Case R-3439 [ARSA's certificate]," petitioner in its reply brief asserted that the letter of the NMB "simply declined to state one way or the other the effect of the dismissal on representation" (Pl. Reply Br., p. 9). It now characterizes the letter as an "obscure response" (Pet. 6). It neglects to make reference to the affidavit filed by Mr. Tracy, Executive Secretary of the NMB, as to the position of the NMB, in the context of its discussion of the NMB position, but relegates reference to this affidavit to a footnote in its argument (Pet. 19, n. 29). The Tracy affidavit was filed in response to the affidavit of the petitioner's Vice President for Labor Relations (May 24, 1972) that the NMB had "ruled" that ARSA representation rights were terminated by the merger. Tracy's affidavit stated, as the Court of Appeals observed (Pet. 16a), that "no such determination was made expressly or impliedly in the National Mediation Board's dismissal notice of June 3, 1970." The Court below found that the NMB "twice repudiated [petitioner's] contention." 503 F. 2d at 63, Pet. 19a.

ARGUMENT.

THE DECISION BELOW IS CORRECT. THERE IS NO CONFLICT OF DECISIONS OR ISSUE WARRANTING REVIEW BY THIS COURT.

Petitioner has taken a bizarre position, based on a bootstrap argument with no basis in fact or law, and completely at variance with long-established railroad industry practices implementing substantially similar employee merger protection agreements.

A. Petitioner presents itself as the champion of its employees and all other railroad employees (Pet. 14, 15). Its plea has a hollow ring. For more than four years the petitioner has shunted aside the collective agreements entered into for the benefit of the employees represented by ARSA, and instead unilaterally determined their rates of pay, rules, and working conditions. For more than four years the petitioner has refused to consider the grievances of its employees represented by ARSA and has litigated awards in their favor entered by the NRAB. For more than four years the employees represented by ARSA have been denied the assistance of ARSA in securing their job protection rights under collective agreements and the MPA.

The delusional quality of petitioner's position, that a railroad union loses its certification under the RLA when a merger is consummated under the facts and circumstances of this case, becomes apparent when its consequences are considered.

(1) It would render impossible the duty of the ICC to "protect the interests of the railroad employees affected" as required by § 5(2)(f) of the Interstate Commerce Act. In many mergers, different railroad labor organizations represent the

same craft or class on the merging railroads. In some mergers, a labor organization will represent a craft or class on one of the merging railroads, and no organization will represent that craft or class on another of the merging railroads. Effective protection for the employees requires that the collective agreements in effect at the time of the merger continue after the merger until changed in accordance with the RLA. These agreements and any job protection provided by the ICC would be meaningless without a union to police them.

(2) Railroad labor organizations could not reasonably be expected to agree to their demise by entering into a merger agreement (See 503 F. 2d at 63; Pet. 19a).

(3) Petitioner's position is completely at odds with industry practice. There have been numerous railroad mergers in the past 10-15 years in which merger protection agreements have been made with similar or identical provisions as the MPA here (Pet. 15). Uniformly throughout the industry, and no exception has been cited by petitioner, the interpretation placed upon such merger protection agreements is that the new or successor railroad after the merger will continue to comply with provisions of the collective agreements made prior to the merger with each of the merging railroads until such agreements are changed in accordance with the procedures of the RLA (J. A. 68-9, 81-90; R., Hickey Dep., pp. 23, 28-34, 56-79). The record also establishes that where a union represented a craft or class on one or more of the merging railroads, the representation or non-representation of that craft or class continued in the new, merged railroad in the same manner as it did prior to the merger on its constituent railroads (*ibid*).

In at least eight major railroad mergers since 1959, under merger protection agreements similar or identical to § 8 of the MPA here, and under facts similar to this case—*i.e.*, where a union represented a craft or class on one or more merging railroads but the craft or class had no union representation on

one or more of the merging railroads, the representation or non-representation of that craft or class continued in the new, merged railroad in the same segmented manner as it did prior to the merger on its constituent railroads (*ibid*). This uniform industry construction and application of merger agreements is the only construction consistent with the language of the agreement and is the only construction which would be acceptable to the labor organizations in the industry. Petitioner's position, if accepted, would create chaos.[2]

B. Contrary to petitioner's assertion (p. 14) the Court below did not hold that under the RLA a "carrier must recognize and bargain with a representational unit that is not carrier-wide . . ." The Court held (503 F. 2d, 63; Pet. 19a):

> "The language in Section 8 of the Employees Merger Protection Agreement to the effect that existing collective bargaining agreements can be changed in accordance with the procedures of the Railway Labor Act does not automatically render applicable the NMB's policy determination under the act that a class or craft bargaining unit must be system-wide in scope. Unless a representation determination is made pursuant to that Act, the voluntary agreement by plaintiff to recognize a collective bargaining representative of a class or craft that is not system-wide will be given effect. Compare *Switchmen's Union* v. *National Mediation Board*, 135 F. 2d 785, 792, rev'd on other grounds, 320 U. S. 297 (1943). If the contrary were true, the Merger Protection Agreement, which became effective only when the merger became effective, would have become a nullity upon its effective date, and the representation rights of ARSA would

2. At the time the MPA here was negotiated, petitioner was fully aware of the uniform industry practice (J. A. 82-3). Also, as the Court of Appeals found (503 F. 2d at 63) contemporaneously in this case, petitioner has placed this very construction on the MPA by continuing to recognize ARSA as the collective bargaining representative of certain crafts of its employees on certain segments of its railroad property and by making new collective agreements and entering into grievance settlements with ARSA for a number of months after the merger became effective on March 2, 1970 (R., Portsche Dep. pp. 63-87).

be terminated by the very agreement that purports to continue them in force."

Petitioner ignores the facts. The agreements in issue were made at a time when, *before* the merger, ARSA did represent the employees on a carrier-wide basis-viz., the supervisors on the CB&Q railroad and the technicians on the Great Northern. Petitioner's whole argument is structured on the false premise that it was forced into these agreements after the merger. All the Court of Appeals held was that these agreements were valid when voluntarily made under the RLA and Interstate Commerce Act and that in the *absence* of a *bona-fide* representation dispute under § 2, Ninth of the RLA, ARSA could continue to represent after the merger the same employees it represented before the merger.[3] Since there is no representation dispute here under § 2, Ninth of the RLA, this case does not present the issue as to whether a union may be certified by the NMB on less than a system-wide craft or class basis. See also ¶ C, *infra*, pp. 16-7.

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3. Petitioner also ignores the essence of the RLA and NMB interpretations that even where there is a change in representative status, the agreements in effect continue until changed in accordance with the RLA. The NMB has always stated that:

"In disputes where there is a collective bargaining agreement in existence and the Board's certification results in a change in the employees' representative, questions frequently arise concerning the effect of the change on the existing agreement. The Board has taken the position that a change in representation does not alter or cancel any existing agreement made in behalf of the employees by their previous representatives. The only effect of a certification by the Board is that the employees have chosen other agents to represent them in dealing with the management under the existing agreement. If a change in the agreement is desired, the new representatives are required to give due notice of such desired change as provided by the agreement or by the Railway Labor Act. Conferences must then be held to agree on the changes exactly as if the original representatives had been continued. The purpose of such a policy is to emphasize a principle of the Railway Labor Act that agreements are between the employees and the carrier, and that the change of an employee representative does not automatically change the contents of an

Petitioner's desperate effort to make this case appear important by referring to merger cases under the LMRA (Pet. 16) is wholly without merit. First, there is a fundamental difference between the LMRA and the RLA in that as noted above (n. 3) agreements made under the RLA have an on-going character. Second, here there is the critical presence of a merger protection agreement, made a condition to the merger by the ICC, which in unmistakably plain language says that petitioner agreed, after the merger, to "take over and assume all contracts . . . and agreements" between ARSA and petitioner's constituent railroads that were in effect at the time of the merger. Whatever problems there may have been for successor employers in mergers or acquisitions under the LMRA in the cases cited by petitioner (Pet. 16) no such problems have ever arisen under the RLA. The only carrier that has ever required "guidance" (Pet. 15) during the spate of railroad mergers and protection agreements over the past 15 years is the petitioner.

Athough petitioner does not assert there is a representation dispute here within § 2, Ninth of the RLA, it contrives artificially to create a representation issue. The fulcrum of petitioner's case is that upon consummation of the merger ARSA lost its representation rights, *i.e.*, was decertified, because as of that time, only a union representing a craft or class for the entire system of the new railroad could be recognized by the railroad. First, it is undisputed that when the MPA was negotiated, ARSA represented the craft or class of mechanical supervisors employed by the CB&Q, and the craft or class of technicians employed by Great Northern (J. A. 5). At that time, and since, ARSA's representation rights have not been challenged by any employee, group of employees or union. Under such circum-

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agreement. The procedures of section 6 of the Railway Labor Act are to be followed if any changes in agreements are desired." 37th Annual Report of the NMB (1971), p. 34; and prior Annual Reports. See also *B. R. T.* v. *Akron & B. B. R. Co.*, 385 F. 2d 581, 593 (C. A. D. C. 1968), *cert. denied*, 390 U. S. 923; and *Manning* v. *American Air Lines*, 329 F. 2d 32, 34 (C. A. 2, 1964), *cert. denied*, 379 U. S. 817.

stances, as the Court of Appeals held (503 F. 2d, 60-1, 62, 63) there is no issue of representation.[4] Thus, when the agreements were made there was no impediment under the RLA to voluntary recognition by petitioner of ARSA as the collective bargaining representative after the merger for the craft it represented.

Second, petitioner also ignores an important labor law principle: a union may become the collective bargaining agent for a craft or class of employees by *recognition* of the employer as well as by election and certification by the NMB. Prior to the 1934 amendments to the RLA there was no governmental mechanism for resolving disputes concerning representation among employees and securing recognition through certification. Thereafter, unless a representation dispute developed among employees which could be resolved under § 2, Ninth, railroads which had previously recognized unions were precluded from refusing recognition. Many unions are presently functioning as collective bargaining representatives without certification. *Akron, C. & Y. R. Co.*, v. *I. B. E. W.*, 237 F. Supp. 343, 350, 354 (N. D. Ill., 1964). Thus, under the RLA a railroad may recognize a union as representative of a craft or class of employees on less than a system-wide basis *(i.e.*, on one or more but less than all segments of a merged railroad), in the absence of any representation dispute, and having accorded recognition may not

4. Also, as stated by the District Court: "Under Section 2 Ninth of the RLA, a representation dispute exists only where an issue has been raised 'among a carrier's employees as to who are the representatives of such employees.' Thus, a representation dispute may be raised only by the employees of a carrier or by a union claiming to represent such employees, *Brotherhood of Locomotive Firemen & Enginemen* v. *N. M. B.*, ... U. S. App. D. C. ....., 410 F. 2d 1025, *cert. denied*, 396 U. S. 878 (1969). The NMB has held consistently that a carrier is not even a party to section 2 Ninth disputes, *Thirty-Seventh Annual Report of the National Mediation Board* at 33 (1971), and its view in this respect is shared by the Supreme Court, *Brotherhood of Railway and Steamship Clerks* v. *Ass'n for Benefit of Non-Contract Employees*, 380 U. S. 650, 666-67 (1965). It should be noted that the RLA differs from the LMRA in this respect also." (Pet. 32a, n. 8; 350 F. Supp. at 901, n. 8).

withdraw it.[5] It is common today on railroads, merged during the past 15 years, to have a union represent a craft or class of employees on one or more but less than all segments of such merged railroads. Prior to petitioner's assertion in this case, there has never been a suggestion by any railroad, by any court or by the NMB that such voluntary recognition and single segment representation is impermissible under the RLA. Here, as the Court below held, 503 F. 2d at 63, the petitioner has recognized ARSA voluntarily twice: (1) by entering into the MPA it recognized ARSA's role after the merger (Preamble, §§ 5, 8, 9, 11 and 12); and (2) by negotiating and making agreements with ARSA after the merger.

Third, the alleged representation issue (*i.e.* decertification) was conjured up after the merger by the petitioner to rationalize and carry out a crude and outright breach of its clear and unequivocal obligation to comply with the MPA, including specifically the obligation to arbitrate, and to continue to recognize ARSA as a party to the contract and to carry out existing collective agreements with it.

Fourth, petitioner knew prior to entering into the MPA that after the merger ARSA would continue to represent on a segmented basis those employees it represented before the merger on petitioner's constituent carriers. (n. 2, *supra.*) Notwithstanding, it proceeded to solemnly enter into the agreement, a condition precedent to securing ICC approval of the merger. Having obtained approval of the merger, petitioner reneged on its promises and now seeks judicial approval of its conduct.[6]

5. But this is not to say, as petitioner does (Pet. 14-15), that the MPA locks the employees into their pre-merger representation. On the contrary, whenever a dispute arises among the carrier's employees as to who are their representatives, the representation may be changed in accordance with § 2, Ninth of the RLA, 45 U. S. C. A., § 152, Ninth. Here, as the Court of Appeals held, there is no such dispute. Petitioner's argument regarding the 1973 Election (Pet. 14-15), a matter not part of the record, falls also for the other reasons stated by the Court of Appeals, 503 F. 2d at 63-4, Pet. 20a.

6. Petitioner thus seeks judicial approval for its violation of the "heart of the RLA", to assert every reasonable effort to make and

The pretext for petitioner's breach of the MPA is the NMB's dismissal of the Great Northern technicians' petition on June 3, 1970. The Court of Appeals summarized the record when it stated (503 F. 2d at 63):

> "The NMB has twice repudiated plaintiff's contention that its action in dismissing the Great Northern technicians' petition on June 3, 1970 implied that the merger terminated ARSA's status as the certified representative of the technician's. The indications NMB has given as to its position in this matter are to the effect that it still recognizes ARSA as the bargaining representative under the collective bargaining agreements entered into between ARSA and plaintiff's predecessors."

Fifth, petitioner's position has the following absurd results: (1) an agreement expressly entered into for the *"protection"* of employees would afford such employees no protection at all but leave them without any of their hard-fought collective agreements and subject them only to the unilateral whims of the carrier; and (2) the labor organizations signatory to the "protection" agreement would be deemed to have voluntarily agreed to give up their right and duty to represent the employees they represented on the component railroads.

C. The argument advanced by petitioner (Pet. 16-22) that the decision below conflicts with the RLA and its legislative history, the NMB and the *Switchmen's* case are all misplaced and irrelevant. They are concerned with genuine representation disputes under § 2, Ninth where in fact a union or group of employees is challenging another union. There is no such dispute here. Thus, the Court below did not and could not hold that in a representation dispute the carrier may be forced to bargain with or recognize a union on less than a system-wide craft basis. Petitioner ignores completely the principle that in the absence of a § 2, Ninth representation dispute a railroad may voluntarily recognize a union even on less than a system-

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maintain agreements concerning rates of pay, rules and working conditions and to settle all disputes. *Chicago & N. W. R. Co.* v. *U. T. U.*, 402 U. S. 570 (1971).

wide basis. The *Switchmen's* case[7], heavily relied on by petitioner (Pet. 19-22), does not conflict with the decision below. It involved a representation dispute under § 2, Ninth of the RLA. Here there is no such dispute and there can be no conflict.

D. We have demonstrated that the MPA, by which the petitioner gave a continuing role to ARSA after the merger, was in complete conformity with the RLA. But assuming *arguendo* there is a conflict between the RLA and the Interstate Commerce Act, the Court of Appeals was completely correct in holding that the ICC's exercise of the plenary authority given to it by § 5(11) of the Interstate Commerce Act could relieve the railroad and the union of their obligations under the RLA. See *Brotherhood of L. E.* v. *Chicago & N. W. Ry.*, 314 F. 2d 424, 431-432 (8th Cir.), *cert. denied*, 375 U. S. 819 (1963), cited below, 503 F. 2d at 63.

Petitioner seeks to distinguish *B. L. E.* on the basis that what was involved there was an issue involving the inability of the railroad and the organization to agree on how employees should be assigned when they were displaced and how work forces should be rearranged. Petitioner overlooks that the basis of the union's claim was that the dispute was "major" under the RLA since it proposed a change in seniority rights and that, accordingly, the railroad was required to serve a notice pursuant to § 6 of the RLA to begin the negotiation process under the Act. This requirement of the RLA is the heart of that statute. Notwithstanding, the Court ruled that under the provision of § 5(11) of the Interstate Commerce Act the ICC could and did relieve the railroad of this obligation under the RLA.

E. The Court below did not usurp the arbitrator's jurisdiction to interpret the agreement. Petitioner argues that the Court of Appeals interpreted § 8 of the MPA, a matter committed to the arbitration panel under § 9 of that agreement, and argues further that § 8 does not involve representation or recognition

7. *Switchmen's Union* v. *N. M. B.*, 135 F. 2d 785 (D. C. Cir. 1943), rev'd for lack of jurisdiction, 320 U. S. 297 (1943).

(Pet. 12, 31, 25-26). To begin with the judgment of the Court of Appeals is limited to a mandate directing the District Court to order arbitration of the issue of interpretation. The court did not decide the issue of interpretation referred to the arbitration panel. It was required to consider the legality of the MPA in order to decide whether to order arbitration—first, because the issue which ARSA sought to have arbitrated involved §§ 8 and 9 of that agreement, and second, because of petitioner's claim that if the agreement recognized ARSA as the collective bargaining agent of the employees on the CB&Q and Great Northern segments of the Burlington Northern after the merger it was invalid.

The Court of Appeals did no more than pass on the contract's legal validity and left the final contractual interpretation to arbitration. Under the RLA the courts frequently give what appears to be "contract interpretation" to agreements in deciding whether the contract should be interpreted by arbitration. See, *e.g.*, *Brotherhood of L. E.* v. *M-K-T R. Co.*, 363 U. S. 528, 533-4 (1960); *U. T. U.* v. *Penn Central T. Co.*, 505 F. 2d 542 (C. A. 3, 1974); *Rutland Ry. Corp.* v. *Brotherhood of L. E.*, 307 F. 2d 21, 35-6 (C. A. 2, 1962).

The petitioner's claim, in particular, required the Court to consider all of the provisions of the MPA and its background. This it did as a necessary prelude to reaching its decision that the agreement was lawful and the issue submitted by ARSA should be arbitrated. In order to create the impression that the Court of Appeals interpreted § 8 of the MPA to require recognition of ARSA by petitioner, petitioner distorts the opinion below. Thus, the petitioner states: "The Court rejected that argument [that representation must be system-wide], holding that as it interpreted and applied Section 8 of the merger protection agreement, Burlington Northern had agreed therein to recognize 'the labor organizations signatory to the agreement including ARSA,' and that Section 8 was a 'voluntary agreement by plaintiff to recognize a collective bargaining repre-

sentative of a class or craft that is not system-wide.' (App. B, pp. 18a, 19a, *infra.*)" (Pet. 12).

The language quoted from the opinion appears in a sentence, the full text of which reads (503 F. 2d at 63):

> "Unless a representation determination is made pursuant to that Act, the voluntary agreement by plaintiff to recognize a collective bargaining representative of a class or craft that is not system-wide will be given effect."

In the paragraph which precedes the sentence above quoted, the Court of Appeals stated (*id.*):

> "In the agreement plaintiff recognized the labor organizations signatory to the agreement including ARSA, committed themselves to maintain and abide by all collective bargaining agreements until such agreements are changed pursuant to the procedures of the Railway Labor Act, agreed to a system for resolving disputes concerning the interpretation and application of the agreement, and agreed to a continued role for ARSA in the implementation of the merger agreement and in the interpretation, application and enforcement of existing collective bargaining agreements."

This statement by the Court constituted a summary of the provisions of the MPA. Petitioner's argument that the Court asserted "jurisdiction to interpret and apply the agreement in this regard and to declare that the railroad was in 'breach' thereof" (Pet. 26) further distorts the opinion. The word "breach" quoted by petitioner is used only once in the opinion. In the context in which it is used it clearly refers to petitioner's refusal to arbitrate the dispute, in violation of § 9 of the MPA which the court held required arbitration.

There is no factual basis for petitioner's repeated assertions (Pet. 12, 13, 23, n. 32 and 26) that the Court of Appeals interpreted and applied § 8 of the MPA so as to require Burlington Northern to recognize and bargain with ARSA. The Court held simply that the issue submitted by ARSA for arbitration

must be decided by arbitration as specified by the MPA. The decision is limited to this holding. Accordingly, petitioner's citations to cases which hold that the interpretation role is for the arbitrator are irrelevant (Pet. 26). It also follows that, contrary to petitioner's claim (Pet. 27), the opinion below is completely consistent with *Bozeman*, one of the decisions cited by the Court below in holding that the obligation to arbitrate will be enforced by the courts.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

ALEX ELSON,
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Attorneys for Respondent, American Railway Supervisors Association.

March 15, 1975.

APPENDIX.

AGREEMENT.

For Protection of Employees Who May Be Represented by the Brotherhood of Railroad Trainmen in Event of Approval of Merger and Related Applications Filed by Great Northern Pacific & Burlington Lines, Inc. and Other Carriers in I. C. C. Finance Dockets Nos. 21478, 21479 and 21480.

* * * * *

Section 2.

* * * * *

(b) The New Company will take over and assume all contracts, schedules and agreements between Great Northern, Northern Pacific, Chicago, Burlington & Quincy and Spokane, Portland and Seattle, respectively, and the Brotherhood of Railroad Trainmen concerning rates of pay, rules, working conditions and fringe benefits in effect on the final effective date of the Commission Order covering the Great Northern Pacific & Burlington Lines merger and will be bound by the terms and provisions thereof in the same manner and to the same extent as if the New Company had been a party thereto, subject to changes made in accordance with the provisions of the Railway Labor Act, and subject to Section 7 of this Agreement.

Section 10.

For the purposes of the Great Northern Pacific & Burlington Lines merger, Section 13 of the Washington Job Protection Agreement (Appendix A) is inapplicable and the following provisions shall apply in lieu thereof:

In the event any dispute or controversy arises between the Carriers and/or the New Company and the representatives of Brotherhood of Railroad Trainmen with respect to the provisions

of an implementing agreement upon which the parties have failed to reach agreement in accordance with Section 8 of this Agreement, the interpretation or application of any provision of this Agreement or of the Washington Job Protection Agreement (except as defined in Section 6 of this Agreement) or of any implementing agreement entered into between the New Company and the representatives of the Brotherhood of Railroad Trainmen pertaining to the said merger or related transaction, which cannot be settled by the Carriers and/or the New Company and the representative of the Brotherhood of Railroad Trainmen within thirty days after the dispute arises, such dispute may be referred by either party to a Disputes Committee for consideration and determination. Upon notice in writing served by one party on the other of intent by that party to refer the dispute or controversy to a Disputes Committee, each party shall, within ten (10) days, select a member of the Disputes Committee and the members thus chosen shall endeavor to select a neutral member who shall serve as Chairman. Should the members designated by the parties be unable to agree upon the appointment of the neutral member within ten (10) days, either party may request the National Mediation Board to appoint the neutral member, whose compensation and expenses shall be paid in accordance with existing law. If any party fails to select its member of the Disputes Committee within the prescribed time limit, such party's Chief Executive Officer or his designated representative shall be deemed to be the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. The Committee shall meet within fifteen (15) days of the selection or appointment of the neutral member and shall render its decision within sixty (60) days thereafter. The decision of the majority of the Disputes Committee shall be final and binding.

Section 11.

This Agreement shall not be construed or used to prohibit or in any way limit the rights or obligations of the parties to modify

or make changes in agreements affecting rates of pay, rules or working conditions to which the Carriers are parties and which may be effectuated through concerted or national handling in the railroad industry.

Section 12.

This Agreement is intended to provide a fair and equitable arrangement for the protection of the interests of the Carriers' employees represented by the Brotherhood of Railroad Trainmen as provided in Section 5(2)(f) of the Interstate Commerce Act, as amended.

Signed at Chicago, Illinois, this 14 day of December, 1965.

FOR THE BROTHERHOOD OF
RAILROAD TRAINMEN:

V. R. ROBERTS,
General Chairman,
Chicago, Burlington & Quincy Railroad
Company.

P. S. GRIFFITH,
General Chairman,
Northern Pacific Railway Company.

JAMES E. HURLEY,
General Chairman,
Spokane, Portland and Seattle Railway
Company.

J. A. MICHELS,
General Chairman,
Great Northern Railway Company.

APPROVED:

F. D. TUFFLEY,
Alt. Vice President.

FOR THE GREAT NORTHERN PACIFIC &
BURLINGTON LINES, INC.:

T. C. De BUTTS,
A. E. EGBERS,
G. M. HARE,
H. J. TIERNEY.

FOR CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY:

A. E. EGBERS,
Assistant to the President.

FOR THE NORTHERN PACIFIC RAILWAY COMPANY:

G. M. HARE,
Chief of Labor Relations.

FOR THE SPOKANE PORTLAND AND SEATTLE RAILWAY COMPANY:

H. J. TIERNEY,
Chief of Personnel.

FOR THE GREAT NORTHERN RAILWAY COMPANY:

T. C. De BUTTS,
Vice President (Labor Relations).